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ABSTRACT

This paper deals with the application of the dissenting opinions of the Supreme Court justices in the Allan Bakke case to a range of admission and hiring practices in which universities have engaged, or might engage. The issues posed in the Bakke case, the basic positions in each of the justices' opinions, and the interrelationship between the opinions are briefly described. The practical implications of the Bakke decision are then discussed in terms of what sorts of university programs of admissions and hiring appear permissible after Bakke. Taken into consideration are the following: (1) the relevance of State law and the distinction between private and public universities; (2) admission practices as they affect disadvantaged and minority students, particularly with regard to racial criteria; and (3) racial and sexual criteria in university hiring. (EB)

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The Implications of *Regents of California* v. *Bakke* For University Admission and Hiring

Kent Greenawalt

In late June of 1978, the Supreme Court finally dealt with the issue of what has come to be called reverse discrimination, or preferential treatment. Considering the use of race as a criterion in admissions to favor members of disadvantaged minority groups that had been previously subjected to substantial societal discrimination, a badly divided court held in *Regents of California* v. *Bakke*, 98 S. Ct. 2733, that it was impermissible for a university to set aside a fixed number of places for minority group members, but that race might be treated as one relevant factor in admissions decisions.

This paper is about the practical implications of Bakke. I am not here interested in the theoretical underpinnings or the ethical and legal defensibility of the various positions, except insofar as these shed light on what is likely to be decided in the future. I try to explain what seems clear after *Bakke* and what is still uncertain, indicating those areas which may be clarified in subsequent Supreme Court cases.

I. THE CRUCIAL OPINIONS IN *BAKKE*

When one explicates the practical significance of a judicial decision, one usually concentrates on the majority opinion. Since that opinion represents what most or all members of the Court have said about a problem, it indicates what they would be likely to decide about a variety of related situations. Unfortunately that approach is not possible for *Bakke*, because there is no majority opinion. Analysis is further complicated because in future cases, as I shall indicate in a moment, some of the Justices may not adhere to the position they took in *Bakke*. As a consequence, if one is to explain the significance of *Bakke*, it is necessary to look at three opinions, not one.

Most of the following paper deals with the application of these three opinions to a range of practices in which universities have engaged, or might engage. As a help to the reader I will briefly at the outset indicate the issues posed in *Bakke*, the basic positions in each of the opinions, and the somewhat complex interrelationship between the opinions.

Allan Bakke challenged the practice of the Medical School of the University of California at Davis of setting a fixed number of places (16 out of 100) in its entering class for disadvantaged applicants of minority groups—blacks, American Indians, Mexican-Americans, and Asian-Americans. He claimed that the Davis special admissions program violated the state constitution, the Equal Protection Clause of the Fourteenth Amendment of the federal constitution, and Title VI of the 1964 Civil Rights Act. He won on all three theories in the state trial court, although little attention was paid to Title VI.

The Supreme Court of California agreed with the lower court that Davis had violated the Equal Protection Clause of the Federal Constitution. Consequently, it did not have to decide whether Davis had also violated the state constitution. No conclusion was reached regarding possible violation of Title VI because the federal statute had become obscured as a possible independent ground of decision.

The case then went to the United States Supreme Court. Since the Supreme Court is the highest authority only on questions of federal law, the state constitutional issue was now out of the case. The Court had to decide if Davis had violated the Equal Protection Clause or Title VI.

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A. The Stevens Opinion

Four Justices, in an opinion by Justice Stevens, decided that Title VI had been violated. That statute governs behavior by federally financed institutions. It says that "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Justice Stevens asserted that the language of the statute barred denying places to whites in favor of minority group members. He added that, according to the sponsors of the section, recipients of federal funds were required to act in a "color blind" manner. Having decided that the Davis program was illegal under Title VI, Justice Stevens and his three colleagues did not need to decide if the program was also unconstitutional; and, since it is the tradition of the Justices not to discuss constitutional issues unnecessarily, they did not address the constitutional question.

B. The Opinion of Justices Brennan, White, Marshall, and Blackmun

Five Justices interpreted the statute differently. Relying heavily on the expressions of sponsors of Title VI, they asserted that it had been designed to prevent federally funded institutions from practicing kinds of discrimination that would be unconstitutional if engaged in by the government. They concluded that the Davis program was illegal under Title VI only if it involved a kind of discrimination that violated the Constitution. So, unlike Justice Stevens, they had to face the constitutional question.

Justices Brennan, White, Marshall, and Blackmun authored a joint opinion which found the fixed minimum quota approach of Davis to be constitutionally acceptable. The initial issue they faced in discussing the constitutional problem was what level of review to accord the Davis program. The Supreme Court applies various levels of review to determine whether a legislative classification violates the Equal Protection Clause of the Fourteenth Amendment, which forbids any state from denying "to any person . . . the equal protection of the laws." When it considers ordinary social and economic legislation the Court asks only whether a classification is rationally related to a legitimate state purpose. Under this "rational basis" standard, the Court rarely invalidates a legislative choice. If, however, a legislative classification is based on a "suspect" criterion (e.g., it disadvantages members of a minority race or religion, or it interferes with the exercise of fundamental rights, such as the right to freedom of speech), then the Court will sustain the legislation only if it is *necessary* to accomplish a *compelling* state interest. When this test is applied, legislation is almost invariably held to be unconstitutional.

It has for some years now been debated whether racial classifications that work to the benefit of disadvantaged minorities should be subject to the same "strict scrutiny" as racial classifications that do them harm, whether such classifications warrant only "rational basis" review, or whether some intermediate standard is appropriate. Justice Brennan and his colleagues opted for an intermediate standard. They asserted that "racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to achievement of those objectives." This standard is intermediate because it indicates more careful review than "rational basis" but is somewhat less demanding than the "compelling interest" test.

In applying their standard, Justice Brennan et al. concluded that the purpose of "remedying the effects of past societal discrimination" is important enough to warrant "race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to medical school." Since a race-blind preference for disadvantaged students would not yield nearly as substantial numbers of minority group students, the four Justices rejected the conclusion of the California Supreme Court that a preference must be cast in nonracial terms. Given the underlying justifying purpose of the Davis program, Justice Brennan et al. also perceived no significant distinction between a flexible preference and one that admits a specified number of minority students. Therefore, they would have sustained the Davis program as permissible.

C. Justice Powell's Opinion

Justice Powell decided, as did the Brennan group, that the Davis program was illegal under Title VI only if it violated the Constitution. He differed from the Brennan group, however, in maintaining that all racial classifications, benign or not, must pass strict scrutiny, that is, can be sustained only if necessary to accomplish a compelling state interest. He added that the government has no compelling interest supporting a university's decision to prefer members of relatively victimized groups at the expense of other individual applicants who are innocent of discrimination unless there has been a legislative or administrative determination that the law has been violated. The opinion as a whole implies that even a legislature could not make such a decision, but does not resolve that issue. It does indicate clearly that a state university cannot properly make such a determination.

There is, however, one reason that Justice Powell deemed adequate to support use of race as a criterion in university admissions. Exposure to a diversity of other students may contribute to each student's education. Since race is an important determinant of perspectives in our society, universities may believe that racial diversity is a significant aspect of student diversity, and thus may consider race as one relevant factor for admissions. Because the universities' educational mission is an aspect of freedom of thought and speech protected by the First

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Amendment, the quest for educational diversity is an interest of constitutional weight and is therefore compelling. But if the aim is to have the best possible student body, rigid quotas are not acceptable. The potential contribution of any one applicant to diversity must be weighed against the potential contribution of other applicants. Therefore, in Justice Powell's view, a flexible admissions policy that gives race some independent weight is acceptable, but a rigid quota is not. For this reason, the Davis program was invalid but a program like that of Harvard College, which pays attention to race as one factor in trying to achieve a healthy diversity, is permissible.

D. The *Bakke* Determination and the Uncertain Future Position of Justice Stevens and His Colleagues

In the *Bakke* case, Justice Powell occupies the middle position. He joins the four Justices subscribing to the Stevens opinion to declare the Davis program invalid, and he joins the authors of the joint opinion to declare race a permissible criterion in admissions decisions. One is initially tempted to say that if he sits in the middle, we need only to look at his opinion to see what will be accepted and what will not. However, there are two serious flaws in such an approach, quite apart from the fact that slender majorities are sometimes changed by retirement and new appointment. The first is that on certain points, not crucial in *Bakke* but important in other settings, Justice Powell says things that sound more restrictive than anything to be found in the Stevens opinion. The second, and more pervasive, problem is the uncertainty regarding the positions that the adherents to the Stevens opinion may take in subsequent cases. The usual practice on the Court is that when a matter of statutory interpretation is settled in one case, the dissenters accept that position in future cases. The theory is that if Congress does not like the interpretation, it is free to alter the statute. If Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger regard *Bakke* as settling that Title VI bars only unconstitutional forms of discrimination, then in future cases they will have to decide, as did the other five Justices in *Bakke*, whether they think preferential programs violate the Equal Protection Clause. It is quite possible that one or more of them will think the Constitution is more permissive of such programs than does Justice Powell, or even agree with the authors of the joint opinion as to what it allows. Therefore, even if the composition of the Court remains constant, Justice Powell may no longer find himself in the middle position. Until we have a better idea how the Justices who joined the Stevens opinion will deal with the statutory and constitutional issues in a later case, many estimates about what is allowed and what is not will be hazardous indeed.

There are two important lessons here. The first is that no institution is obligated to suppose, or even should assume, that Justice Powell's opinion states the outer limits of what is permissible. Though is it true that any program his opinion would permit will be viewed as acceptable by the present Court, it is not necessarily true that any program his opinion would forbid will be viewed as unacceptable. The second lesson is that if one wants to obtain a firmer basis for knowing what a university may and may not do, he must look very closely at the opinions of the Stevens group in subsequent cases, to see how they now intend to treat Title VI, and, if they are going to accept the majority view of the statute, how they regard the constitutional question.

II. THE PRACTICAL IMPLICATIONS OF *BAKKE*

We are now in a position to review what sorts of university programs of admissions and hiring appear permissible after *Bakke*.

A. The Relevance of State Law and the Distinction Between Private and Public Universities

1. *Possible State Law Prohibitions*

A preliminary general point may be made about the interaction of federal and state law. Even though federal law permits a practice, state law may not. In the antidiscrimination area there is still considerable room for the operation of state law, and it is possible that a state court would accept the kind of claim raised in the lower courts in *Bakke* and successful in the trial court there: namely that a state constitution or a state antidiscrimination law precludes a race-conscious preference. Nothing said in *Bakke* would seem to bar a state from making that decision, although the university could raise the counterargument that a state restriction of that kind would be unacceptable under the federal statutes or Constitution. If federal law legitimately requires certain conduct, then contrary state law must give way; but if federal law only permits conduct without requiring it, as *Bakke* apparently decides about flexible race-conscious admissions preferences, then state law may forbid the conduct, unless such a prohibition would violate some provision like the First Amendment.

Although it will probably exercise influence on state courts considering state statutes and constitutions, the Supreme Court's decision in *Bakke* is strictly only a guide about the interpretation of federal law. A university whose program survives federal attack might still be defeated by a state court interpretation of state antidiscrimination law. This essay makes no attempt to survey the possibilities among the various states and so gives incomplete advice on whether any particular program is likely to be sustained against a broad-based challenge. What the essay addresses is the consistency of various practices with prevailing federal law.

2. *Public and Private Universities*

When preferential treatment was perceived primarily as a constitutional problem, it was thought that private universities might have more latitude to take race into account than state institutions. However, the practical significance of such a possibility was pretty much eliminated by the Supreme Court's handling of the *Bakke* case. According to a majority of Justices, Title VI is interpreted to bar discrimination that would be unconstitutional. The Equal Protection Clause of the Fourteenth Amendment applies directly only against the states, but the Supreme Court has said that the Due Process Clause of the Fifth Amendment imposes the same constraints on the federal government. Therefore any discrimination that would violate the Equal Protection Clause if practiced by a state university would violate Title VI if practiced by a federally funded private university. Of course, that means that if a university is willing to forego federal grants

altogether, it will be free of both Title VI and the constitutional requirements, but few private universities are in that position.

B. Admissions Practices

1. *No Preference for the Disadvantaged*

None of the opinions in *Bakke* suggest that universities *must* give a preference to members of disadvantaged minorities or to disadvantaged persons more generally. Some scholars had argued in the past that a "neutral" admissions policy, based on grades, test scores, geographical distribution, athletic prowess, etc., would violate federal law if it had the "effect" of admitting few minority students; but the Court gives no indication that such a policy, honestly applied on a non-racial basis, would be illegal. Indeed, since Title VI is interpreted to bar only unconstitutional discrimination and since the Court has previously said that only intentional discrimination violates the Constitution, it seems quite clear that a neutral policy of no preference is a permissible option.

2. *A Nonracial Preference for the Disadvantaged*

No court or scholar has seriously doubted that a preference for the educationally and economically disadvantaged, administered without regard to race or ethnic origin, is permissible. It has, of course, been traditional for universities to take background into account in evaluating individual potential, but a university might go beyond this, regarding part of its mission as affording opportunities for the less advantaged even when they are less well qualified, all things being taken into account. *Bakke* poses no barrier to such a policy even if a rigid minimum quota is set for "disadvantaged" applicants; and indeed the California Supreme Court suggested such an approach as a permissible alternative to the Davis program. Title VI bars only discrimination on grounds of race and other specified bases; it says nothing about discrimination in favor of the culturally deprived. And such discrimination would not be a "suspect" classification for equal protection purposes. It would not call forth application of the compelling interest test or, presumably, even the intermediate standard of review employed in *Bakke* by Justices Brennan, White, Marshall, and Blackmun. Judged against the relaxed rational basis criterion, a policy of preferring the disadvantaged would certainly pass muster.

3. *Individualized Admissions Decisions with Race Being Given Some Independent Weight*

Since Justices Brennan, White, Marshall, and Blackmun are willing to accept more than Justice Powell, a use of race in admissions which Justice Powell would allow is clearly acceptable. In attempting to achieve educational diversity, he says, universities may take racial and ethnic characteristics into account. To satisfy him, however, there must be a unified admissions process with the potential contribution of each applicant being weighed against the potential contribution of all other applicants.

Does Justice Powell's approach impose a substantial constraint on the scope of a preferential program or the basis for preferring particular minority applicants? Here I think we must differentiate between a conscientious application of the principles of Justice Powell's opinion and the likelihood that a program defended in their terms would be held invalid. If a university set out to take Justice Powell as an authoritative guide it would have to examine the extent to which racial criteria in admissions contribute to desirable educational diversity, and it would have to reject any preferences that it could not justify to itself in terms of this purpose. And in deciding whether to admit any particular "less qualified" applicant, it would have to ask what particular contribution he would be likely to make to the education of his fellow students. This might mean, for example, paying more attention than is now paid in most preferential programs to the willingness and skill of a minority applicant in communicating with the majority of his prospective fellow students.

In practical terms, however, the whole point of this part of Justice Powell's opinion is that academic freedom protected by the First Amendment requires that universities be given wide latitude to make admissions decisions on educational grounds. He says explicitly that in the absence of evidence to the contrary, "good faith would be presumed" and "a Court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system." Thus there is a limit to how far the courts would probe the real reasons for admitting particular minority applicants; and any university system that focused on individual applicants with no minority quota or stated goal would probably be approved by Justice Powell.

If Justice Powell's opinion did actually become the prevailing approach on the Court, a university might properly take the attitude that whatever its own views about desirable preferences it should limit its program strictly in terms of the purpose approved by Justice Powell. As I have indicated previously, however, it is still too soon to conclude that Justice Powell's approach will prevail, so the dilemma such a situation would pose has not yet arisen, and may not arise.

4. *A Flexible Preference Program With a Standard or Rough Goal of Minority Students Sought for Each Entering Class*

It is almost certainly a fact of life that most universities and colleges giving independent positive weight to an applicant's membership in a minority group have some idea how many such applicants will be admitted to an entering class. And this idea is typically based on some implicit or explicit decisions about what would be a desirable "mix" and how many "less qualified" entrants the school wants to have. Thus, for example, at one point some law schools were admitting virtually every black applicant they believed could successfully complete their programs. As the qualifications of blacks have risen sharply over the last decade, such a policy among the most prestigious schools might now produce a class that was mostly black, since for every place to be filled there are scores of actual and potential applicants who are qualified in this minimal sense. Needless to say what has happened is that a black applicant must have higher grades and test scores than a decade ago to be admitted, though on the average he still need not have grades and test scores as high as those of a white applicant.

In commending the admissions program of Harvard College, Justice Powell did not acknowledge the extent to which individualized weighting of race typically reflects an implicit assumption about the general number of minority students an institution seeks to admit. There will, of

course, be variances from year to year in the actual number of minority students admitted and entering, but at most schools the variances probably will not be very large.

Given Justice Powell's stated intention to defer to university judgment, and the probability that he was not unaware that even flexible programs employing a racial criterion give some consideration to numbers, it seems unlikely that the presence of such a notion would condemn an otherwise acceptable program in his mind. We know, of course, that Justices Brennan, White, Marshall and Blackmun would permit such a program since they would allow rigid quotas. To comply with Justice Powell's view, however, it is important that an institution have a unified admissions process, not one that precludes competition for places between minority group and other applicants. It is also important that no fixed number or percentage of places for special minority admittees be formally set and that there be some variation in the number of entering minority students each year, bearing witness to the reality that there is no unspoken minimum quota.

If a university decided to give positive weight to minority status, both the opinions of Justice Powell and that of Justice Brennan et al. suggest quite wide discretion concerning the groups whose members may benefit. The joint opinion indicates that in trying to remedy the harmful effects of prior societal discrimination, universities have broad latitude to decide which groups shall require preferences and which shall not, so long as any groups that are given the preference have been substantial victims of discrimination and are presently disadvantaged. For Justice Powell, the question is whether membership in a particular racial or ethnic group is likely to make a significant contribution to educational diversity, and the whole premise of his approach is that such matters should be left to university judgment.

5. *Rigid Minimum Quotas on Racial Lines and Separate Admissions Processes*

Rigid minimum quotas are, of course, the approach that *Bakke* disallows. However, it is possible that a Justice who believed that such quotas violate Title VI might in a subsequent case accept the majority's reading of the statute, i.e. that Title VI bars only unconstitutional forms of discrimination. If he then concludes that the Constitution permits quotas, it is conceivable that a program similar to that of Davis would now survive Supreme Court review. But in all probability, the Court would simply regard the invalidity of such a program as settled by *Bakke* and not even review the case. Certainly it would be highly imprudent for a university now to continue a rigid minimum quota. As I have indicated, Justice Powell is not entirely clear whether a choice by a legislative body to have such quotas would be invalid, although he implies it would be, but, in any event, the passage of such legislation seems highly unlikely in most states.

One aspect of the Davis program was a separate admissions process for disadvantaged minority applicants. It would be possible to have such a process with some bargaining at the end of each admitting season over how many disadvantaged students would be given entry, instead of having a minimum quota set in advance. Although *Bakke* does not squarely settle the inappropriateness of a separate admissions process apart from the minimum quota, it seems very unlikely that such a process would survive Justice Powell's analysis, which places great emphasis on the importance of direct competition between minority applicants and other applicants. The prospects for such a process would, therefore, have to depend on approval of one of the Justices joining the Stevens opinion.

The doubtful legality of a separate admissions process probably would not extend to some preliminary special screening of minority applications or to the viewing of these applications during the normal process by persons who would not see other applications. The crucial point is that when admissions decisions are finally made, minority applications should not be in a separate pool passed on by people different from those who make other admissions decisions.

6. *Corrective Use of Racial Criteria in Admissions*

The courts have recognized that when institutions have discriminated illegally in the past, one proper remedy may be to order that the relevant benefits be extended to members of the group that has suffered. For example, if an employer has refused to hire blacks, it may be hard to identify all the blacks that would have been hired but for his discrimination, so a court may order that in subsequent hirings a specified percentage of blacks be given jobs. Since the group of present minority applicants to an academic institution is unlikely to have many members of a generation that may have suffered discrimination in the past in the admissions policies of the institution, this use of race to correct identifiable discrimination by the institution involved has not been common. Yet, it is conceivable that an institution might decide to use race for this reason. Since Justices Brennan et al. accept the use of minimum quotas in the absence of prior discrimination, they would, of course, accept such quotas in this context as well. The other opinions seem to assume that corrective use of racial quotas can be appropriate in at least some instances. Justice Powell observes that judicial or administrative bodies may authoritatively make findings with regard to past discrimination and establish remedies responsive to that discrimination. Nevertheless he implies rather strongly that a voluntary determination to use racial quotas to correct past discrimination would not be sufficient. Justice Stevens's opinion does not address this issue of the permissibility of voluntary corrective racial quotas. Since Title VI is apparently consistent with corrective use of racial criteria, it is possible that the Justices joining this opinion would accept reasonable voluntary corrective measures as well as those imposed on institutions from without. Probably the basic problem with advancing such a justification for minimum quotas is not that an institution has undertaken them voluntarily, but rather that they may seem an inappropriate remedy for discrimination in the past that imposed harm on an almost entirely different set of people from those now benefitted by a preference.

C. University Hiring and Racial and Sexual Criteria

Because *Bakke* deals with admissions rather than hiring, it is more difficult to discern the views of Justices on the appropriateness of the use of racial criteria in hiring. Yet the opinions do shed some light on that subject. Before discussing specific practices we may note four significant differences between hiring and admissions.

First, university hiring is covered not only by Title VI of the Civil Rights Act of 1964 but also by Title VII of that act, which forbids discrimination on grounds of race and

gender in employment, and by Executive Orders, which mandate nondiscrimination in employment by government contractors. Thus, it is possible that a hiring practice consistent with Title VI might be inconsistent with one of these other parts of federal law. Second, whereas preferential treatment for women in admissions has generally not been thought necessary to overcome the effects of past discrimination, the situation has been different with the use of gender as a criterion for employment; thus the important questions about university hiring concern sex as well as race. Third, the typical, though not exclusive, use of racial and gender criteria in employment has been purportedly to correct past discrimination or preclude future discrimination by the institution involved; it has not been to remedy the effects of general societal discrimination by an undoubtedly "innocent" institution. Fourth, in hiring determinations the university walks a tightrope. As we have seen, no one is now seriously contending that most universities have a legal obligation to pursue preferential admissions policies, but if a university does not hire a significant number of women and minorities, it stands to be sued by members of those groups or, even more threatening, to lose federal funds through the decision of a federal enforcement agency. If, on the other hand, it seeks to hire a sufficient percentage of women and minorities, it runs the risk of suit by unsuccessful white male applicants who claim they have been subjected to employment discrimination.

1. *Preventive and Corrective Use of Racial or Sexual Goals or Quotas*

The primary use of racial and sexual goals in university hiring has, in theory, been preventive and corrective, and often these goals have been undertaken in compliance agreements with the Civil Rights Division of the Department of Health, Education and Welfare. The typical basis for HEW action has been a discrepancy between the percentage of women and minorities on a faculty, and the percentage of available women and minorities calculated on the basis of Ph.D.'s in the field and similar criteria. There has been a sharp debate over whether these standards are a fair basis for evaluating university hiring, but we shall pass over that issue. The presence of a substantial discrepancy is not actual proof that discrimination has taken place, but it is considered an appropriate basis for requiring the university, if it wants to continue to receive federal money, to undertake an affirmative action program that is supposed to prevent discrimination from occurring in the future. Affirmative action has included such steps as objective criteria for hiring, open advertising of positions and attempts to recruit minority and female appointees. It has also included the setting of "goals" for the hiring of women and minorities, ostensibly as one test of the university's compliance with the requirements of active recruitment and fair hiring determinations.

There is nothing in *Bakke* to cast any doubt on the propriety of affirmative action steps that do not imply differential treatment of applicants on the basis of sex or race, so we can quickly pass over matters such as objective and advertised criteria, and active recruitment efforts. As preventive and corrective measures these are clearly legitimate even if undertaken by a university that has not previously discriminated.

The troublesome questions concern the goals set for the hiring of women and minorities. Perhaps we can identify three basic positions a university might take. It might simply disregard the goals, hiring without regard to sex or race, hoping that a nonpreferential policy would meet the goals but standing ready to defend its action if they did not. It might tip the balance in close cases toward women and minority group members, paying attention to the goals but not treating them as minimum quotas. Finally, it might take the goals as minimum quotas, choosing plainly less well qualified women and members of minority groups if necessary to meet the goals. Of course to speak of "the university" here is a gross oversimplification because hiring decisions are not centralized and departments may not uniformly adhere to policy suggested by university administrators. Also, these three basic postures are subject to various shadings, but for analytical purposes they will suffice.

a. Race-Blind and Sex-Blind Hiring Decisions

It has been HEW's stated policy that all it seeks of most universities is nondiscrimination in hiring decisions. But if a university's attempt to apply that approach yielded numbers of women or minorities far short of its goals, it would run substantial risks. It would have difficulty establishing that it had not discriminated. Academic hiring decisions are based on complex factors and it would be hard to prove that decisions had not been affected by inappropriate stereotypes (e.g , that women generally are not good classroom teachers), reliance on which would constitute discrimination. Moreover, to date the Supreme Court has held that even non-intentional discrimination may violate Title VII. For example if an employer uses a test for employment, such as a general aptitude test, that excludes a disproportionate number of women or minorities and is not based on "business necessity," it has discriminated within the meaning of the statute. It is possible that some university criteria for employment (e.g., requiring scholarly potential of teachers of basic courses) might be thought not to be justified by "business necessity." Such criteria might then be seen as non-intentional discrimination which would be in violation of Title VII. Although the "disproportionate impact," "business necessity" approach has seemed firmly settled, its future status is not now entirely clear. The Supreme Court has said that the standard for unconstitutional discrimination is intentional discrimination, and in *Bakke* it has interpreted violations of Title VI to require unconstitutional discrimination. An attempt to bridge the interpretation of Title VI and Title VII might be to suggest that if an employer continues to use a test that he knows has a disproportionate impact and is not justified by "business necessity," at that point he has begun consciously to discriminate. In any event, so long as there is no authoritative interpretation of exactly what constitutes

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discrimination in university hiring, a university that fails to hire the right proportion of minorities and women is hardly on unshakeable ground when it asserts that it has not discriminated.

Even if a university could finally persuade a court that it has acted legally, if it failed initially to persuade the relevant federal enforcement agency and had its funding temporarily cut off, it could suffer disastrous effects; so ultimate victory cannot be the only standard of behavior for prudent universities. In the fall of 1978, the burden of enforcement in respect to universities shifted from the Civil Rights Division of H.E.W. to the Office of Federal Contract Compliance Programs of the Labor Department. It is too early to tell whether satisfying this Office will be easier or more difficult than satisfying HEW, although one suspects that OFCCP may be less attentive to what universities perceive as their special problem.

b. Decisions Attentive To Race and Sex

Suppose that in close decisions a university tips the balance in favor of women and minorities. So long as the decisions are genuinely close and the university states that it is hiring the best qualified, all things considered, these decisions are unlikely to be subject to effective attack. The government enforcement agencies are probably going to be satisfied by the hiring of minorities and women, and the courts are unlikely to second-guess complex decisions about academic qualifications. Indeed, one point of Justice Powell's opinion in *Bakke* is the danger of extensive government scrutiny of such decisions.

If, however, a university acknowledged that it had passed over a white male it regarded as slightly better qualified, all things considered, than a black or a female it hired, then a substantial issue would be presented. The university could argue that its preference for the black or woman was designed to counter possible unconscious bias, or inappropriate standards, and was meant only to achieve nondiscrimination. Alternatively, it could argue that it believed that having more minority and female faculty members would contribute to educational diversity and benefit the whole university community. *Bakke* gives little guidance on whether the first argument would be successful. Neither does *Bakke* settle whether Title VII will be interpreted to permit conscious preferences for women and minorities if those groups have been previously discriminated against and now suffer disadvantage. Presumably, Justice Stevens and his three colleagues would have said that Title VII requires employers, at least those not guilty of past discrimination, to be color-blind and sex-blind. If they take that position, the university would somehow have to convince them that race and sex consciousness in academic employment decisions is the only way to avoid discrimination through unconscious bias. If the other five Justices take a position in respect to Title VII like their position on Title VI they would probably permit race and sex consciousness; Justices Brennan et al. to help remedy prior societal discrimination and Justice Powell to promote educational diversity.

c. Rigid Adherence to Goals

A university might choose to satisfy set goals at any expense, hiring markedly less well qualified applicants to meet them. It is also conceivable that OFCCP will impose much more rigid standards on the universities than H.E.W. has yet done. Imposed quotas might be barred by Title VII itself, which explicitly states that nothing in that title shall be interpreted to require preferential treatment based solely on an imbalance in the percentages of groups presently employed. And *Bakke* renders it somewhat doubtful whether voluntary adherence to a rigid minimum quota would be acceptable. Justice Powell, who objected to the use of rigid minimum quotas in admissions, presumably would find it no more justified in the interests of educational diversity. Success would then depend on trying to convince some Justices that quotas really are a necessary technique for preventing discrimination against women and minorities in hiring. That argument might receive some support from lower court decisions sustaining agreement by government contractors to aim for set percentages of minorities and women in employment for more mundane kinds of jobs. But it is uncertain whether it would persuade Justice Powell or the Justices who subscribed to the Stevens opinion in *Bakke*.

d. Race-Conscious or Sex-Conscious Goals or Quotas to Remedy Prior Discrimination

If a university had entered against it a determination that it had discriminated in its past academic hiring, then a set percentage of women and minorities to be hired would probably be accepted. No opinion in *Bakke* challenges the appropriateness of such a remedy for prior discrimination by the institution in question. Of course, to be justified as a specific corrective, the percentages to be hired would have to bear a close relation to the scope of prior discrimination.

Suppose that no judgment against the university has been made, but the university concedes that it has discriminated, or, under pressure from a government enforcement agency, undertakes programs premised on an assumption of prior discrimination. In Justice Powell's opinion, as already has been indicated, measures that are justified only as corrective of past discrimination can apparently be triggered only by authoritative judicial or administrative findings of such discrimination. But the opinion of Justice Stevens does not speak to the issue, and it is quite possible that some of the Justices who joined him would accept voluntary or quasi-voluntary measures to correct discrimination that has not been authoritatively determined to have existed.

The case of *Weber* v. *Kaiser Aluminum & Chemical Corporation*, 536 F.2d 216 (1977), which in mid-December 1978 the Supreme Court agreed to review, may provide guidance on a number of these issues. Under some pressure from the government, the employer and relevant union agreed that a fixed percentage of minority workers would be able to enter on-the-job training for craft positions. The majority on the court of appeals held that without a sufficient showing of prior discrimination, such a program was invalid. The dissenter contended both that the program was a justifiable response to arguable discrimination by Kaiser, and that it was warranted in any event to remedy more general societal discrimination. The Supreme Court's treatment of these issues should indicate whether the Justices will approach employment problems under Title VII differently from admissions problems under Title VI. It is possible, as the two different theories in the dissent suggest, that a majority of the Supreme Court may agree on a result without necessarily agreeing on a single theory, some Justices treating Kaiser's program as permissibly cor-

rective of possible discrimination and others regarding it as acceptable reverse discrimination.

Universities concerned about hiring practices will want to watch carefully the Court's disposition of the case, which may also help to illuminate further the Court's likely stance regarding preferential admissions programs.

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